Supreme Court, U.S.
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No. 96-1084 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARK MOREHEAD,

Petitioner,

v.

ATKINSON-KIEWIT, J.V. and
WOODS HOLE TOWING COMPANY, INC.,

Respondents.

ROCCO P. DiGIOVANNI, JR.,

Petitioner,

v.

TRAYLOR BROTHERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT, ATKINSON-KIEWIT, J.V.'S, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where one entity acts in a dual capacity (the maritime employer and the vessel owner pro hac vice), must the plaintiff prove that the defendant was negligent in its capacity as the owner pro hac vice in order to recover under 33 U.S.C. §905(b)?

2. What is the definition of "vessel in navigation" for purposes of the Jones Act, 46 U.S.C. §688?

LIST OF PARTIES

The parties to the proceedings below in the matter of *Morehead v. Atkinson-Kiewit, J.V.* were the Petitioner, an individual resident of Cranston, Rhode Island.

Respondent, Atkinson-Kiewit, J.V., was a Rhode Island joint venture. Atkinson-Kiewit, J.V. has no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 28.1.

Respondent, Atkinson-Kiewit, J.V., is uncertain as to the state of residence of Petitioner, Rocco P. DiGiovanni, Jr.

Respondent, Atkinson-Kiewit, J.V. is advised that Respondent, Traylor Brothers, Inc., is an Indiana corporation. Respondent, Atkinson-Kiewit, J.V., has no knowledge whether Respondent, Traylor Brothers, Inc., has any parent corporations, subsidiaries, or affiliates to list pursuant to Rule 28.1.

By way of background, these two actions arise out of the construction of the Jamestown Bridge, spanning Narragansett Bay between Jamestown, Rhode Island and North Kingstown, Rhode Island. The contract for the construction of the bridge was originally awarded by the State of Rhode Island to Clark Fitzpatrick. When that company defaulted on the contract, Traylor Brothers, Inc. was engaged as an interim contractor until the project could be rebid. Atkinson-Kiewit, J.V., a joint venture between Peter Kiewit Construction Company and Guy F. Atkinson Construction Company, was the successful bidder to complete the bridge construction project.

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED. i
LIST OF PARTIES ii
TABLE OF CONTENTS. iii
TABLE OF AUTHORITIES iii
OPINIONS BELOW. 2
STATUTE INVOLVED 3
STATEMENT OF THE CASE. 4
REASONS FOR DENYING THE WRIT 5

I. The Statutory Language Is Clear. Any Change Must Come From Congress Not The Judiciary. 5

II. The Decisions Of The Court Of Appeals Are Consistent With The Decisions Of This Court 8

III. The Decisions Are Consistent With The Decision Of The Fifth Circuit And The Second Circuit And Do Not Create Split. 9

IV. The Issue Of Vessel In Navigation Has Been Previously Denied By This Honorable Court And Was Not An Issue In The En Banc Panel. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Castorina v. Lykes Brothers Steamship Co., Inc., 758 F.2d 1025, 1033 (1985). 6, 9, 10, 11

Chandris v. Latsis, 115 S.Ct. 2172 (1995) 8

DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119 (1st Cir. 1992) 12

DiGiovanni v. Traylor Brothers, Inc., 113 S.Ct. 87 (1992). 12

Cases, continued: Page

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 7

Fanetti v. Hellenic Lines, Ltd., 678 F.2d 424 (2nd Cir. 1982) 9, 10, 11

Guilles v. Sea Land Services, Inc., 12 F.3d 381 (2nd Cir. 1993) 11

Jackson v. Lykes Brothers Steamship Co., Inc., 386 U.S. 731 (1967) 5

Jones & Laughlin Steel Corporation v. Pfeifer, 462 U.S. 523, 531 (1983) at fn. 6 . . . . . 6, 8, 10, 11

Levene v. Pintail Enterprises, Inc., 943 F2d 528 (5th Cir. 1991) 11

Miles v. Apex Marine Corporation, 498 U.S. 19 (1990) 5, 8

Pichoff v. Bisso Towboat Co., 748 F.2d 300 (5th Cir. 1984) 9, 10

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981) 7, 10

Smith v. Eastern Seaboard Pile Driving, Inc., 604 F.2d 789 (2nd Cir. 1979) 9, 10

Southwest Marine Inc. v. Gizoni, 502 U.S. 81 (1991) 9

Statutes:

33 U.S.C. §902(3) 9

33 U.S.C. §905(a) 3, 5, 6, 7

33 U.S.C. §905(b) . . . . . *passim*

46 U.S.C. §688 et seq. 2, 12

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TO THE HONORABLE SUPREME COURT:

The Respondent, Atkinson-Kiewit, J.V., respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari submitted by Petitioners, Mark Morehead and Rocco P. DiGiovanni, Jr.

OPINIONS BELOW

Respondent, Atkinson-Kiewit, J.V., presents herewith the summary of the opinions below for the Mark Morehead matter only. Suit was brought in the United States District Court for the District of Massachusetts. Plaintiff originally brought suit pursuant to the Jones Act, 46 U.S.C. §688 et seq., General Maritime Law for unseaworthiness of the Barge CHER 106, General Maritime Law for maintenance and cure benefits, and for negligence under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). Prior to trial, plaintiff voluntarily withdrew the claims for negligence under the Jones Act, 46 U.S.C. §688, and the General Maritime Law counts. A non-jury trial commenced on April 11, 1994, before Senior Circuit Judge Aldrich on the claim under Section 905(b) of the LHWCA. By agreement of counsel, the matter was tried to the Court on liability only.

On May 2, 1992, Senior Circuit Judge Aldrich found in favor of the Defendant. The Trial Court held that the open hatch was a temporary condition created solely in its capacity as "charterer." The parties agree that the reference should be to Atkinson-Kiewit, J.V. as employer, not charterer. The Trial Court also noted that any negligence was that of a fellow servant.

The United States Court of Appeals for the First Circuit affirmed the judgment on February 6, 1996. In a lengthy decision, the panel affirmed the dual capacity doctrine, requiring a plaintiff to prove that a dual capacity vessel owner was negligent in its capacity as vessel owner and not in its employer capacity. On the same day, a different panel decided the *DiGiovanni v. Traylor Brothers* appeal, rejecting the dual capacity. En Banc review was granted and the En Banc panel affirmed the

Morehead panel decision. The panel opinion of the First Circuit, and the Findings and Order of Senior Circuit Judge Aldrich are reproduced in the Petition for Writ of Certiorari. The pertinent opinions and decisions in the *DiGiovanni v. Traylor Brothers, Inc.* litigation are also reproduced therein.

STATUTE INVOLVED

33 U.S.C. §905. EXCLUSIVENESS OF LIABILITY

(a) Employer liability; failure of employer to secure payment of compensation.

The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death.

(b) Negligence of vessel.

In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be

liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

STATEMENT OF THE CASE

On January 29, 1990, Mark Morehead sustained an injury when he stepped backwards into an open hatch on a barge owned by R.A. Francour Marine, Inc. and bareboat chartered to Atkinson-Kiewit, J.V. ("Atkinson"). Mr. Morehead was performing duties as a harbor worker employed by Atkinson. Morehead was a carpenter and a member of Local 94 of the Carpenter's Union and was working as a carpenter on the day he sustained his injuries. His duties as a carpenter included barge-related tasks, such as loading and unloading barges, handling the lines on the barges, and moving the barges. The Trial Court found that at the time Mr. Morehead sustained his injuries, he was standing on board the HUGHES 707, while a fellow employee, Steven Breault, was standing on board another barge, the CHER 106. The Trial Court also found that the configuration of the barges was as follows: The CHER 106 was tied up alongside the dock, and the HUGHES 707 was tied up to the CHER 106. In addition, the Tug PROVIDENCE was tied alongside the HUGHES 707.

Atkinson was a joint venture formed for the purpose of constructing the Jamestown Bridge in Rhode Island. As part of the project, Atkinson bareboat chartered several barges, including the CHER 106 and the HUGHES 707. Both Mr. Morehead and Steven Breault were

employed by Atkinson as carpenters. As such, they were responsible for performing all tasks on the barge, including handling lines and moving barges.

Atkinson was "wearing two hats" in this matter. The first "hat" was a pro hac vice owner of the barges. Its other capacity was as contractor. In the latter capacity, Atkinson employed Mark Morehead and Steven Breault, and was responsible for the direction and supervision of all matters pertaining to the barges. Steven Breault was engaged in performing functions pursuant to his employment as a carpenter both at the time he opened the hatch and at the time of the accident. Performing work on the barges was the essence of the nature of Mr. Breault's employment. Furthermore, Morehead never introduced any evidence pertaining to any actions taken by Atkinson in its capacity as vessel owner.

REASONS FOR DENYING THE WRIT

I.

THE STATUTORY LANGUAGE IS CLEAR. ANY CHANGE MUST COME FROM CONGRESS, NOT THE JUDICIARY.

This litigation involves an interpretation of the interplay between Section 5(a) and Section 5(b) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §905(a) and 33 U.S.C. §905(b). In *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967), Justice Stewart noted in his dissent, "It is our duty to apply the law, not to repeal it." *Id.* at 737. See also *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), where Justice O'Connor noted, "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies. . ." *Id.* at 32.

The statute here is very clear. Under Section 5(a), 33 U.S.C. §905(a), the "liability of the employer" is limited to the payment of compensation benefits. There is no allegation that benefits were not paid to Mr. Morehead. Under Section 5(b), 33 U.S.C. §905(b), to recover tort damages, the maritime employee must prove "negligence of the vessel." Where the employer is also the vessel owner pro hac vice, the dual capacity doctrine requires the maritime employee to prove which capacity of the defendant was negligent. *Jones & Laughlin Steel Corporation v. Pfeifer,* 462 U.S. 523, 531 (1983) at fn 6.

The difficulty with the case herein is not the statutory language, which is clear. The difficulty is the factual situation in which the cases arises. "Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel." *Id.* at 530. "If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel." *Id.* at 532. Here, there is not a perfect tripartite situation. The stevedore and the vessel owner are the same and the Court of Appeals clearly struggled trying to identify the different parties. Circuit Judges Selya and Cyr both suggested that the Supreme Court or Congress must provide guidance to the lower courts to resolve this difficult area of the law. Respondent suggests that the proper remedy is for Congress. "This scheme of compensation requires us to separate the negligence of the shipowner and that of the stevedore, even though the shipowner performs its own stevedoring activities." *Castorina v. Lykes Brothers Steamship Co., Inc.*, 758 F.2d 1025, 1033 (1985). The *En Banc* opinion noted:

> "We agree with the Fifth Circuit, for similar reasons, that the duties of care described in *Scindia* should be applied in dual capacity cases insofar as the facts allow. To do so, a Court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner. . ."

Petitioners suggest in their Brief that the decisions conflict with the statutory language. They suggest that Stephen Breault was "an employer of the vessel." The Trial Court made a finding of fact that he was not a vessel employee. This was not clearly erroneous.

Petitioner further suggests that the dual capacity doctrine treats similarly situated workers differently. Petition for Writ of Certiorari at page 13. In fact, it is the petitioners who are asking for dissimilar treatment. In the typical tripartite situation, the longshoreman or harborworker would be required to prove vessel negligence. *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981). Petitioners proposed that as long as they can show defendant's negligence, regardless of which capacity, that is sufficient. This is not supported by the statutory provision, the precedent of this Honorable Court, and the decisions of the several Federal Courts of Appeal. In *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), this Honorable Court noted that "all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." *Id.* at 266. Under the petitioner's proposal, the exclusivity under §905(a) would be eliminated. If the defendant is negligent, it will be liable, even if the negligence was in its capacity as a stevedore. This is directly opposite from what Cir-

cuit Judge Selya suggested in his concurrence. He suggested that *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U.S. 523 (1983) was wrongly decided and that this Honorable Court should reconsider the allowance of a tort action under §905(b) in the harborworker context. That proposition would inevitably result in an affirmance of the *En Banc* decisions.

II.
THE DECISIONS OF THE COURT OF APPEALS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT.

In *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U.S. 523 (1983), this Honorable Court noted in footnote 6 as follows:

> 6. Of course, §5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its "owner" capacity, not for negligence in its "stevedore capacity".

This is a clear statement of the dual capacity doctrine. This rationale was followed in the *En Banc* decision.

Petitioner argues that the First Circuit en banc panel was incorrect in looking at the employees' overall employment duties. Petitioner instead argues for a "snapshot" test, examining the specific duties being performed at the time of the incident to determine if it was "vessel negligence" or "employer negligence." This approach was not even adopted by the dissent. Under *Chandris v. Latsis*, 115 S.Ct. 2172 (1995), the test for seaman status is two-fold, the second part of which examines the overall duties of the maritime worker. *Miles v. Apex Marine*, 498 U.S. 19 (1990) made clear that "seaman" and "longshoreman" are mutually exclusive. A maritime worker is either a longshoreman or a seaman, but he cannot be both. The legislative history cited by the

En Banc panel is clear that in determining if an individual is a longshoreman, the focus is also upon the worker's overall duties. This is consistent with *Southwest Marine Inc. v. Gizoni,* 502 U.S. 81 (1991). In *Gizoni,* this Honorable Court held that even if an individual is performing work specifically listed as longshore employment, 33 U.S.C. §902(3), the worker is not automatically precluded from bringing a Jones Act suit. *Id.* at 89. If the worker satisfies the *Chandris* seaman test, seaman recovery is permitted. The obvious implication of Petitioner's argument is that a harborworker can bind a vessel owner. No case has so held. Not even the one case cited by the en banc panel stands for that proposition. *Pichoff v. Bisso Towboat Co.,* 748 F.2d 300 (5th Cir. 1984) was limited to a discussion of whether the ship repairer immunity in §905(b) applied. There was no discussion whatsoever of the dual capacity doctrine.

The petitioners have not pointed to any conflict with any Supreme Court decision sufficient to mandate this Honorable Court granting the Writ of Certiorari. See Rule 10.1(c) of the Rules of the Supreme Court.

III.
THE DECISIONS ARE CONSISTENT WITH THE DECISION OF THE FIFTH CIRCUIT AND THE SECOND CIRCUIT AND DOES NOT CREATE A SPLIT.

Petitioner argues that the *En Banc* panel decision is inconsistent with decisions in the Fifth Circuit and the Second Circuit, citing *Pichoff v. Bisso Towboat Co., Inc.,* 748 F.2d 300 (5th Cir. 1984); *Smith v. Eastern Seaboard Pile Driving, Inc.,* 604 F.2d 789 (2d Cir. 1979); *Fanetti v. Hellenic Lines, Ltd.,* 678 F.2d 424 (2nd Cir. 1982).

The *En Banc* panel decision expressly adopted the rationale of a decision of the Fifth Circuit, to wit: *Cas-*

torina v. Lykes Brothers Steamship Co., Inc., 758 F.2d 1025 (5th Cir. 1985). That case arose after the *Pichoff* decision. Any inconsistency is superseded by the *Castorina* decision. Further, as was previously argued, there is no inconsistency. *Pichoff* arose on distinguishable facts and did not even discuss the dual capacity doctrine.

There also is no conflict with the Second Circuit. *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2nd Cir. 1979) is a decision that predated *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1979), and *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U.S. 523 (1983). That case involved a scuba diver who drowned while inspecting a barge. The Court specifically noted, "Thus, in order to determine whether a shipowner-employer may be held liable for damages, a Court must decide if the negligence that caused the accident was 'owner occasioned.." *Id.* at 795. This is entirely consistent with the *En Banc* panel decision.

Fanetti v. Hellenic Lines, Ltd., 678 F.2d 424 (2nd Cir. 1982) arose one year after the decision in *Scindia*, but had a minimal reference to that seminal decision. In *Fanetti*, the stevedore was hired directly by the owner of the M/V HELLENIC SPLENDOR to load containers in Brooklyn, New York. Even though there was a dual capacity employer the shipowner/stevedore were readily distinguishable, there being separate "crew" and "longshoremen". Mr. Fanetti was the winch operator for hatch No. 2. In order to get to the winch controls, he was required to traverse over an area of the deck where the *vessel crew* was placing lashing gear. The Court specifically noted "These hazards were generated by the actions of the vessel's crew." *Id.* at 426. Thus, Fanetti actually was an active involvement case and liability under *Scindia* would be sustainable. It also is appar-

ent that the area where the slip and fall injury occurred was not an area that was under the control of the stevedore. The case involved a discussion as to the propriety of jury instructions requested by the vessel owner. The *En Banc* panel herein noted *Fanetti* predated the decision in *Jones & Laughlin.* Further, *Fanetti,* has not been followed by any subsequent case, in any circuit.

In addition, *Guilles v. Sea Land Services, Inc.*, 12 F.3d 381 (2nd Cir. 1993), raises an issue whether *Fanetti* is even followed in the Second Circuit. That case involved a dual capacity employer who was sued by a shoregang employee injured while ascending the vessel gangplank. Although much of the litigation was submitted by stipulation, the Court notes:

> This case presents an issue of first impression over the interpretation of §905(b), which governs the remedies for negligence available against vessel owners for those maritime workers covered under the LHWCA. The question is whether a harbor worker like Guilles is entitled to recover in negligence under §905(b) against a vessel owner like Sea-Land that is also the employer of the harborworker.

Id. at 1225-1226. The Court therein makes no reference whatsoever to *Fanetti,* even though it would appear to be certainly relevant. The Second Circuit cites approvingly to *Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528 (5th Cir. 1991), a Fifth Circuit case which discussed at length the necessity of distinguishing between negligence of the employer and negligence of the vessel owner. *Id.* at 531-533. *Levene* cites extensively to *Castorina,* and *Jones & Laughlin.* These are the very cases which are contrary to *Fanetti* and reinforce the proposition that *Fanetti* is no longer applicable after *Jones & Laughlin v. Pfeifer,* 462 U.S. 523 (1983).

IV.

THE ISSUE OF VESSEL IN NAVIGATION HAS BEEN PREVIOUSLY DENIED BY THIS HONORABLE COURT AND WAS NOT AN ISSUE IN THE EN BANC PANEL DECISION.

The Petitioner prays this Honorable Court grant certiorari on the issue of "vessel in navigation" under the Jones Act, 46 U.S.C. §688 et seq. That never was an issue in the *Morehead* litigation. Prior to the trial, Petitioner voluntarily withdrew his claims under the Jones Act and General Maritime Law for unseaworthiness and maintenance and cure benefits. The matter proceeded to trial only on the cause of action under §905(b) of the Longshore and Harbor Workers' Compensation Act.

The vessel in navigation issue under the Jones Act arose in the DiGiovanni litigation. The first trial resulted in a jury verdict for plaintiff under the Jones Act. A different *En Banc* panel of the United States Court of Appeals for the First Circuit ruled that Mr. DiGiovanni was not a seaman because he was not injured aboard a vessel in navigation. *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992). Petitioner filed a Petition For A Writ of Certiorari. The Petition was denied. *DiGiovanni v. Traylor Brothers, Inc.*, 113 S.Ct. 87 (1992). Thereafter, the matter was remanded to the Trial Court and a trial under the §905(b) cause of action ensued, resulting eventually in this Petition. This issue was not presented to the lower court and is not properly raised in this Petition.

CONCLUSION

For all the foregoing reasons, Respondent Atkinson-Kiewit, J.V. respectfully urges this Honorable Court that the Petition for a Writ of Certiorari be denied.

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